Ashkenazy Property Management Corporation d/b/a L'Ermitage Hotel *and* Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO. Case 31-CA-10775

1 February 1984

DECISION, ORDER, AND ORDER REMANDING FOR FURTHER HEARING

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 April 1982 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a response, cross-exceptions, and a supporting brief and the Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

In ordering the reinstatement of the Respondent's housekeeping department employees, who the Respondent discharged in response to the Section 7 concerted activity of certain of those employees, the judge concluded that it was unnecessary to determine whether assistant housekeeper Eloisa Jacobo is an employee or a statutory supervisor since, even if she were a supervisor, her discharge tended to interfere with, restrain, and/or coerce employees in the exercise of their Section 7 rights. Although no party has excepted to this conclusion, we note that the judge erred in finding that Jacobo is entitled to reinstatement with backpay in either circumstance. Subsequent to the issuance of the judge's decision, the Board, in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), stated that "it is irrelevant that an employer may have hoped, or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity" and held that the discharge of a supervisor as a result of the supervisor's participation in concerted activity, even when allied with rank-and-file employees, is not unlawful. In light of *Parker-Robb* we shall remand the case for further hearing to determine whether assistant housekeeper Eloisa Jacobo is an employee or a statutory supervisor.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondent, Ashkenazy Property Management Corporation d/b/a L'Ermitage Hotel, Beverly Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the case be, and hereby is, remanded for further hearing before Administrative Law Judge Kennedy for determination of whether Eloisa Jacobo is an employee or a statutory supervisor, and that thereafter he shall issue a supplemental decision containing findings of fact, conclusions of law, and a recommended Order. Thereafter, Section 102.46 and 102.48 of the Board's Rules and Regulations shall apply.

IT IS FURTHER ORDERED that this proceeding be remanded to Administrative Law Judge James M. Kennedy for the purpose of arranging such hearing.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at Los Angeles, California, on January 5-6, 1982, pursuant to a complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on April 14, 1981, and which is based on an original charge filed by Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also excepts to the judge's finding that one of the handmade picket signs which the employees carried outside the hotel read "Naomi Nelson Out," contending instead that many signs carried this legend. Contrary to the assertion of the Respondent, the record does not demonstrate that many signs called for Supervisor Nelson's dismissal, but only that "at least one" sign read "Naomi Nelson Out." Whatever the specific number of such signs may have been, we agree with the judge's conclusion that the principal objective of the employees' complaints was to inform the Respondent of the employees' complaints and not to obtain Nelson's discharge. In view of this conclusion, we find it unnecessary to pass on the judge's discussion concerning the analogy between demanding the discharge of a supervisor and the proscriptions of Sec. 8(b)(1)(B).

The Respondent has further excepted to the judge's finding that the parties stipulated that five other employees would have testified in substantial harmony with the four employees who testified as to the 1 January meeting between most of the housekeeping department employees and Assistant Manager Cabanillas. While the record fails to reveal that such stipulation was made, we do not agree with the Respondent's contention that the erroneous finding of the judge warrants a totally independent review of the record as the testimony of the four witnesses is in itself sufficient to sustain the judge's findings and conclusions.

Chairman Dotson notes that *Abilities & Goodwill*, 241 NLRB 27 (1979), has no application to the facts of this case.

In adopting the judge's conclusion that the employees were engaged in concerted activity when assembled to protest working conditions, Member Hunter finds it unnecessary to pass on the judge's alternative reliance on *Coronet Casuals*, 207 NLRB 304 (1973), or the judge's discussion of *Abilities & Goodwill*, 241 NLRB 27 (1979), in fn. 7 of the decision.

(herein called the Union), on January 15, 1981. The complaint alleges that Ashkenazy Property Management Corporation d/b/a L'Ermitage Hotel (herein called the Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

Issues

Whether or not the Respondent discharged its housekeepers for making a concerted protest regarding their working conditions; whether the Respondent, when it learned the housekeepers had later sought the Union's assistance, interfered with, restrained, or coerced employees to inhibit such assistance; and whether, if the Respondent did those things, a bargaining order running in favor of the Union is an appropriate remedy. The General Counsel alternatively alleges that the picketing which occurred after the alleged discharges amounts to an unfair labor practice strike.[1]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. The Respondent's Business

The Respondent admits it is a California corporation which operates a hotel located in Beverly Hills. It further admits that during the past year, in the course and conduct of its business, its gross volume exceeded $500,000 and that it annually purchases goods and materials valued in excess of $2,000 from sources outside California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background and Participants*

As noted, the Respondent is a hotel in Beverly Hills. In late 1980 it received a "5 star" rating by the Mobil Guide. It is considered a first-class hotel by nearly all standards. Its general manager is Alexis Eliopulos nee Hrundas. The hotel operates on a five-department basis. These are: food service which handles the kitchen and restaurant; the front desk, including reservationists, PBX operators, and night auditors; the bell staff, including bellmen, garage attendants, and valets; housekeeping, including maids and other assorted classifications; and maintenance.

In November 1980 the Respondent appointed a new executive housekeeper, Naomi Nelson. She replaced Bebe Shaw, who had been discharged earlier that year. During the hiatus between Shaw and Nelson, head bellman Joseph "Mack" Ducharme temporarily served that capacity as well as his own.

Also during late 1980, the Respondent employed an individual named Joseph Cabanillas. The Respondent's answer admits he was the assistant manager, although it appears from Hrundas' testimony that Cabanillas was hired as a "project manager" to oversee certain redecorating projects and the general physical upgrading of the hotel. This included, apparently, remodeling the entire fourth floor. By the time of the hearing neither Cabanillas nor Nelson remained employed by the Respondent. Indeed, it appears that they left within a short period after the incidents to be described herein. Neither testified.

Shortly after Nelson assumed the duties of executive housekeeper she displayed an attitude and issued directives which caused dissatisfaction and discontent among the housekeeping staff consisting primarily of Hispanics, although there were a few blacks. Some of her actions were seen as racially motivated; others were viewed as harsh. Examples of asserted racial prejudice are: telling Office Supervisor Sonia Moya she had "germs" because of her close contact with the maids, that she was not to answer Nelson's telephone (although they shared the same office and Moya served as dispatcher) and spraying the phone with disinfectant after Moya used it; telling a black employee to cease wearing a wig; telling Hispanic employees they had unacceptable table manners and she would have to teach them how to eat politely, even though the staff ate in a lunchroom away from public view; instituting a grooming inspection which involved checking the employees' hair and fingernails; and prohibiting maids from wearing rings and other jewelry.

Examples of her harshness include the denial of earned overtime pay (including doctoring timecards), threatening to fire an employee for failing to say "good morning," telling the staff they were not to use the elevators when going from one floor to another even when carrying loads, denying an employee the opportunity to go home for a few hours to tend a sick baby, telling employees that if they wished to see her about any matter they must make an appointment a week in advance through Moya, and on December 29 directing the housekeeping staff to work without advance notice a mandatory 12 additional hours of overtime in order to ready the fourth floor for guests. The last deprived those employees of the opportunity to adjust their personal lives to accommodate the demand, i.e., to arrange for babysitters and the like, while simultaneously telling them that their personal problems should be left at home. In addition, Nelson issued a directive requiring employees to purchase new shoes which, on their hourly wage, the staff deemed too expensive. The directive may have extended to new uniforms as well, but the record is not clear regarding that.

[1] By posthearing letter, the General Counsel has moved to withdraw complaint pars. 14 and 15 upon failure of proof. The motion is granted.

B. *The Events of January 1, 1981*

Shortly after Christmas 1980 some of the employees, led by Eloisa Jacobo and Florencia Maciel, signed a paper which they characterized as a petition in order to determine the number of employees who were willing to make a complaint against Nelson. The complaint was to be directed to Cabanillas, probably because General Manager Hrundas had left for her vacation. The document does not have any purpose stated on its face but is signed by approximately 23 employees (Jacobo signed it twice). At least one signature is dated December 27 and it is fair to presume that most of the signatures were obtained on or by that date.

The extensive overtime required on December 29 to ready the newly refurbished fourth floor ignited these employees even further. Immediately afterwards the employees decided to speak en masse with Cabanillas on the morning of January 1. About 7:30 a.m. that day most of the day-shift housekeeping employees assembled in the basement lunchroom. They were joined by members of the late night shift as they went off duty. There may have been some employees from the early evening shift as well. Of the approximately 55 housekeeping department employees it is estimated that 43 were assembled in the lunchroom that morning.

Four employees, Alicia Portillo, Oscar Galdamez, Florencia Maciel, and Francisco Flores testified about the meeting. The parties stipulated that five other employees would have testified in substantial harmony with those four.

It appears that employee Isabel Chavez was the principal employee spokesman who engaged in most of the conversation with Cabanillas on his arrival. However many others spoke as well. The testimony of Flores, a houseman, appears to be particularly useful. He testified that when Cabanillas arrived he asked what the problem was. Flores says Chavez explained that the employees had a problem with Nelson. Cabanillas asked why the employees were not satisfied working with her. Chavez replied that the employees did not feel comfortable working with Nelson and if she did not change her ways the employees would not work with her. Flores says Cabanillas replied he would not be able to change her because she "was appreciated very much" by the hotel's owners. Then Chavez repeated, joined by others, that if Nelson could not change her ways the employees would not work with her.

Similarly, Maciel remembers Chavez attempting to inform Cabanillas about employee complaints against Nelson. She did not hear everything after that although later she heard Cabanillas say that one of the owners, Ashkenazy, was happy with Nelson. She also remembers Chavez saying to Cabanillas, "If you would understand us a little bit, maybe we could work something out. We are ready to go back to work." Galdamez, a houseman, says that each employee who had been mistreated by Nelson told Cabanillas what had happened and that Cabanillas asserted they should have filled out a written complaint. Portillo remembers that when Cabanillas arrived he told the employees to go to work, but they told him they would not until he listened to them. Cabanillas then asked what the employees wanted; Portillo replied that the employees, without identifying which ones, said they wanted "Mrs. Nelson to leave." She remembers others telling Cabanillas that the Hotel should get rid of Nelson or the employees would not go to work.[2]

An amalgamation of the testimony of these individuals shows that after Cabanillas told the employees management was happy with Nelson and that he could not change her ways, he asked them to go to work. The employees did not immediately respond, but it is not clear that they refused. Some, of course, were not scheduled to work anyway and so were not obligated to follow that instruction. He then left the meeting for a few minutes, saying he would be back shortly. He returned minutes later with a paper for them to sign. Flores testified Cabanillas said the paper was for the employees to sign "to terminate us." Flores announced he was not going to sign because the employees were not asking to be terminated but asking Nelson to change her ways. He recalls Cabanillas replied, "Then if you don't sign the piece of paper, then you guys are terminated, and I want you guys out of here, and if you don't get out of here I'm going to call the security guard."

Although Cabanillas did not testify, and the document which he asked the employees to sign has not been presented, I conclude that Cabanillas was attempting to circulate a resignation for all to sign. When they refused, he declared they were fired and should leave upon pain of arrest by the security guards if they did not.

The employees then went outside and milled about the employee entrance for the rest of the day. Later that morning Cabanillas came outside. Portillo remembers him saying it was worthless to stay as they had been terminated; if they did not leave he would call the police and/or the immigration authorities. Later the police arrived, observed the situation, and then left. Portillo's testimony is partially corroborated by Oscar Galdamez and by Eloisa Jacobo.

On January 3 several employees who were not present during the January 1 meeting, as they were on their days off, appeared for work and some attempted to enter. Moya testified that, when she attempted to enter, a security guard prohibited her, saying she had been fired by Nelson and Cabanillas. Similarly, Herminia Perez also sought to work but the guard told her he had "orders not to let anyone in." Perez saw the guard bar two others, Maria de los Angeles and Adela de la Luz. Gregoria Alvarenga also failed to get past the guard. Laura Cardenas testified that she arrived on January 3 to go to work, but having learned from a coworker that the guard was not letting anyone in, declined to try. In addition, there are reports that Concepcion Molina and Carmen Gonzales were ready to work that day, but the evidence regarding their efforts to enter is indirect.

[2] Portillo asserts that she remembers two employees, Sonia Moya and Eloisa Jacobo, making those remarks. I believe she is mistaken with regard to Moya because Moya was not scheduled to work that day and did not attend the 7 a.m. confrontation. After it was over another employee telephoned Moya and she then learned what had happened that morning. She arrived much later. It is also unlikely that Eloisa Jacobo made such a statement because Jacobo was Nelson's immediate assistant, has a timid nature, and was not at the meeting for at least a portion of that time, being on the phone to Nelson herself.

Later while the employees continued to wait outside the hotel Cabanillas spoke to them. Moya testified that she, Eloisa, and Lupe Jacobo were in a group to whom Cabanillas spoke. She remembers Cabanillas saying, "Lupe, you are crazy." Lupe replied she was not, but maybe he was. Cabanillas continued, "Everything happened because of you, Lupe . . . I am going to 'linchar' you." As can be guessed, the word "linchar" is a quasi-Spanish slang term meaning "lynch." Moya recalled Cabanillas laughed and continued, saying Mrs. Hrundas "was really mad, and she was coming down with a machine gun." The parties stipulated that a number of witnesses would corroborate Moya's testimony.

C. *The Union Arrives on the Scene*

On the date of the discharges, indeed until January 6, the employees were not represented by any labor union. It was not until January 5 that union organizer Stephen Beck appeared at the hotel to find out what was happening. Even prior to his arrival, however, some of the employees who continued to wait outside the hotel had begun carrying picket signs with various messages. One of the signs read: "Naomi Nelson Out" and another said, "Discrimination."

Beck testified that on January 5 he had learned that some sort of job action was occurring at the Respondent. Later that day, he went to the hotel to investigate. He spoke to Florencia Maciel and Eloisa Jacobo who were waiting at the bus stop in front of the hotel. He learned something of the dispute from them and also learned that they were waiting for the general manager to return in the hope that she would resolve the dispute. He told the employees he would come back on the following day.

On January 6 Beck returned at approximately 10 a.m. Maciel and Moya introduced him to the employees and he learned that the dispute had not yet been settled. He asked if they wished the Union to represent them. He distributed authorization cards which they signed and urged them to picket the front of the hotel as well as its service entrance.

Beck added some of the Union's own picket signs to further publicize the dispute. He joined the employees when they picketed both the front and rear of the hotel that day. On the following day, January 7, the picketing resumed, beginning at 8:30 a.m.

Beck testified that sometime between 9 and 10 a.m. Hrundas appeared while he was picketing. He observed her speaking to some employees; Moya identified her. Beck introduced himself and told Hrundas, "The employees of L'Ermitage, or these employees out here, have signed authorization cards to have Local 11 represent them. If you would like to talk, we as a committee of us, a few employees and myself, would like to talk to [you]." He says Hrundas replied that she had never met him before and did not know who he was. She said she knew her employees had known them for many years, and she was going to talk to them. Beck replied, "Do as you please but I don't think that will solve our problem, because they have authorized us to represent them."

Hrundas then invited the entire group, except Beck, inside. Beck recalls approximately 30 employees entered with Hrundas.

It appears from their testimony that once inside the hotel Hrundas spoke to each employee, either individually or in numerous small groups. Moya's testimony was typical of the routine Hrundas followed. The first question Hrundas asked was, "Who called the union?" Moya replied she did not know. Then Hrundas said, "Tell me what happened." Although the record is not clear it appears Moya explained the events which led to the employees' dissatisfaction with Nelson and ultimately the meeting of January 1. Hrundas asked why the employees could not have waited for her return from vacation. Moya replied that it had become too much. She also reported Cabanillas' remark that Hrundas was coming with a machine gun. Hrundas expressed dismay and near disbelief. At the conclusion of their discussion, Hrundas directed Moya to go home, to leave by the back door, and not to talk to the people from the Union as they were troublemakers. Hrundas concluded the conversation saying she would have a meeting with the Respondent's vice president and Ashkenazy.

Moya asked Hrundas if she could stay while Hrundas spoke to Esther Villanueva as Villanueva did not speak English. Moya served as a translator and described a nearly identical conversation between Hrundas and Villanueva.

Alicia Portillo testified that during her conversation with Hrundas, which included five other employees and an interpreter, Hrundas asked who had called the Union; stated she was upset because the employees had turned their backs on her when she was not present; and said it was wrong to have called the Union and she did not want the Union in the hotel. Portillo, however, did not testify that Hrundas issued a directive not to talk to the union officials.

Furthermore, Hrundas promised each employee that she would make a decision regarding recalling them in the next 2 or 3 days. The record is not clear regarding exactly what did occur within that time period, but thereafter union official Beck found that few of the employees would cooperate with him. The parties stipulated that other employees would testify similarly with Moya and Portillo on this question. Hrundas did not deny either Moya's or Portillo's testimony.

IV. ANALYSIS AND CONCLUSIONS

The General Counsel contends that the activities of the employees on January 1 constituted protected concerted activity within the meaning of Section 7 of the Act and that Cabanillas' response, i.e., the discharge of the entire housekeeping department, violated Section 8(a)(1) of the Act. Alternatively, the General Counsel contends that the employees were engaged in a strike, that the employees were discharged for striking, and that the picketing which ensued was an unfair labor practice strike. The Respondent, on the other hand, contends that the employees were engaged in unprotected activity as their purpose was to seek the discharge of a statutory supervisor, Executive Housekeeper Naomi Nelson.

It certainly is true that some of the employees on January 1 voiced a desire to get rid of Nelson; indeed that demand appeared later on one of the picket signs even

before the Union came on the scene. Nonetheless, principal spokesman Chavez was attempting to speak to Cabanillas primarily to obtain changes in Nelson's attitude and the manner in which she was making decisions regarding working conditions. This effort was reported by Maciel and Flores. Only Portillo actually testified that employees wanted to get rid of Nelson, but she was mistaken in some respects and her perceptions are not deemed as reliable as those of the others. It seems to me that Maciel's description of what occurred, described in more detail by Flores, has the most probability of being accurate. It is not clear whether the conversation between Chavez and Cabanillas was in English or Spanish but Maciel would have understood either. She remembers colloquy between Chavez and Cabanillas in which Chavez attempted to engage in a dialogue about "working something out." Flores' corroborating testimony described Chavez as asking Cabanillas to get Nelson to change her ways.[3]

Clearly, the main thrust of the employees' demands were not to get rid of Nelson but to obtain management's agreement that Nelson would approach her job in a less dictatorial manner and, no doubt, to attempt to get Nelson to refrain from what was viewed as an ethnically discriminatory attitude toward the employees. That some of the employees may have wanted to solve the problem by radical surgery, i.e., Nelson's discharge, in no way undermines the fact that spokesman Chavez was attempting to solve the problem by asking for less drastic measures.

I conclude, therefore, that the principal thrust of the employees' collective demands on January 1 were to inform Cabanillas and higher management that Nelson was being perceived by the employees as an unreasonable dictator and that management should correct the problem. A clearer example of protected activity by employees could not be found. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Moreover, it is not certain, as contended by the Respondent in its brief, that those employees who went further and demanded Nelson's discharge were engaging in unprotected conduct. The Respondent has not been able to cite a case standing for that proposition[4] and, except for the prohibition set forth in Section 8(b)(1)(B) barring a labor organization from restraining or coercing an employer in the selection of a representative for the purpose of collective bargaining or adjusting grievances, the Act does not specifically prohibit such a demand. Here, of course, no labor organization was involved and Section 8(b)(1)(B) cannot literally be applied. The Respondent concedes this but argues that the demand should be regarded as unprotected through an analogy to Section 8(b)(1)(B).

It may be that in some circumstances the analogy should be drawn and the activity rendered unprotected, but here the facts do not support such a conclusion. The purpose of the January 1 meeting was not to obtain Nelson's discharge, but to inform management of the employees' complaints. The excessive demands of a few employees do not taint the protected demands of the rest. As the Board has said, the isolated unprotected statements of a few individuals do not render unprotected the concerted activity of the whole group. *Coronet Casuals*, 207 NLRB 304 at 305 (1973), citing *Montgomery Ward & Co. v. NLRB*, 374 F.2d 606 (10th Cir. 1967).

Cabanillas, moreover, acting on telephoned instructions from Nelson, made no distinction between the two demands. Nor did he distinguish between employees who were scheduled to go to work and those who were not. He simply discharged the entire group, even though at least one quarter of the assembly had just come off shift and were not subject to that requirement.

In that circumstance, it appears clear that Cabanillas was not reacting to the employees' specific demands or even to the lost time involved; he was reacting only to the concerted nature of their assembly. Had he wanted to tell employees to leave if they did not wish to work, a lawful demand,[5] he could have easily said so. Instead he told everyone they were terminated and, once they were outside, repeated the statement. If there are any doubts about the breadth of the Respondent's intention here, it is dispelled by the events of January 3 when Nelson barred from coming to work approximately six more employees who were in no way involved in the January 1 demonstration. Clearly on January 1 the Respondent had made the decision to discharge the entire housekeeping department en masse. It was a simple reprisal against employees who on that date had made a concerted effort for their mutual aid and protection. Such conduct violates Section 8(a)(1) of the Act,[6] and I so find.[7]

[3] Flores testified in Spanish but appeared more perceptive than Portillo who also testified in Spanish.

[4] *Dobbs Houses*, 135 NLRB 885 at 888–889 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963), appears almost to entirely negate the Respondent's contention as a matter of law. There the Board said:

> [U]nder well-established precedent, concerted action by employees to protest an employer's *selection or termination of a supervisory employee* is not automatically removed from the protection of the Act. Each case must turn on its facts. Where, as here, such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do, they are legitimately concerned with his identity. Therefore, strike or other concerted action which evidences the employees' concern is no less protected than any other strike which employees may undertake in pursuit of a mutual interest in the improvement of their conditions of employment. [Emphasis added.]

[5] *Wilson & Co.*, 77 NIRB 959 at 979 (1948), and *Electric Auto-Lite Co.*, 80 NLRB 1601 at 1605–06 (1948).

[6] *NLRB v. Washington Aluminum Co.*, supra.

[7] In view of the above finding it is unnecessary to deal with the General Counsel's alternate theory that the mass discharge converted the "strike" into an unfair labor practice strike Even so, as his argument appears to miss a basic point, I shall comment briefly on it. Assuming that the January 1 meeting was a strike (an assumption which is not clear in view of Cabanillas' request that the employees wait for his momentary return), the employees were fired immediately thereafter. In *Abilities & Goodwill*, 241 NLRB 27 (1979), cited by the General Counsel, the administrative law judge found, following previous Board law, that the discharge of strikers did indeed convert their strike to an unfair labor practice strike. He recommended the then traditional remedy, requiring the strikers to make application for reinstatement. The Board, on review, changed the remedy, holding that discharged strikers were entitled to be treated in the same fashion as any other unlawfully discharged employee. Thus the burden to offer reinstatement was shifted to the employer and backpay commenced on the date of the discharge. No distinction between economic and unfair labor practice strikers is now required under the new analysis. The only time the distinction need be made thereafter is if permanent replacements have been hired between the inception of the

Continued

The complaint alleges that Cabanillas' statement of January 3 to Lupe Jacobo that he would lynch her[8] and that Hrundas was coming with a machine gun violated Section 8(a)(1) of the Act. Although Moya took Cabanillas' remarks seriously she agreed that he was laughing when he made the statement. First, the remarks should be put in perspective; they should not be taken literally. These were not threats to murder Lupe Jacobo or others. Hrundas is a genteel lady and the likelihood that the general manager of a five-star Beverly Hills hotel would actually appear on a picket line with a machine gun is preposterous and the employees knew it. Similarily, Cabinallas' lynching remark approaches the same level of improbability. Nonetheless, it is fair to take his remarks seriously insofar as he was inferring that Lupe Jacobo was their leader and would somehow be punished by Hrundas upon her return. Thus I find that the Respondent, through Cabanillas, violated Section 8(a)(1) of the Act by threatening adverse consequences to Lupe Jacobo's employment relationship.

Moreover, it appears to me that the General Counsel has proven that, on January 7, the Respondent, through Hrundas, violated Section 8(a)(1) of the Act by asking each employee who the union instigator was. There was no legitimate purpose to her inquiry except to determine the ringleader and the inquiry itself necessarily implied that the ringleader would suffer adverse consequences when his or her identity became known. Cf. *NLRB v. Finesilver Mfg. Co.*, 400 F.2d 644 at 646 (5th Cir. 1968). Likewise, Hrundas' directive to refrain from speaking to the union officials after the meeting was over in conjunction with her reference to deciding about their recall within 3 days carried with it the threat that adverse consequences would occur, such as refusing to recall employees who disobeyed. Clearly, that statement directly interfered with, restrained, and coerced employees from engaging in further union activities, and violated Section 8(a)(1).

Although less clear, it also appears that Hrundas' questions to employees regarding why they had sought union representation, coupled with her promise to speak to the vice president and Ashkenazy, constituted an implied solicitation of employee complaints simultaneously implying that those complaints would be remedied if they abandoned their effort to obtain union representation. That, too, violates Section 8(a)(1).

Finally, the complaint alleges that on January 7 Hrundas' conduct amounted to a threat to take away benefits, but I am unable to find any proof regarding that matter. This allegation should be dismissed.

strike and the discharge of the strikers. If replacements have been hired during that time the Board will not order their dimissal. See the Board's order in *Gulf Envelope Co.*, 256 NLRB 320 (1981). In the instant case, the discharges occurred when the "strike" began; no replacements could have been hired during the period in question and a finding now that the strike was an unfair labor practice strike would be immaterial insofar as the remedy is concerned. The General Counsel's allegation was at all times, therefore, unnecessary to the resolution of this case.

[8] The lynching remark is not specifically alleged as a violation but is undenied. It was in the same conversation as the machine gun remark and the Respondent had full opportunity to have litigated it if it wished. It chose not to deny the conversation. Accordingly, I am obligated to make findings regarding it. *Gogin Trucking*, 229 NLRB 529 fn. 2 (1977).

V. THE REMEDY

The next question which must be resolved, in addition to the traditional remedies requiring the Respondent to cease and desist from its unlawful activities and to reinstate unlawfully discharged employees and make them whole is whether or not the Respondent should also be required to recognize and bargain with the Union. Upon careful analysis I conclude that a bargaining order is not appropriate.

It should be noted that on January 6 the Union had obtained the signed authorization cards of a majority of the Respondent's housekeeping department employees. The parties stipulated that on December 31, 1980,[9] there were 55 employees in the Respondent's housekeeping department. Furthermore, it appears from the record that at least 33 of the discharged employees signed authorization cards on January 6.[10] Even if I do not count the card of Eloisa Jacobo, who the Respondent asserts was a supervisor, the majority is still maintained.

Yet there are serious problems here with a bargaining unit limited to housekeepers. First is a procedural and legal difficulty. The complaint alleges that an appropriate unit is one which includes both housekeepers (listing certain job classifications) and maintenance employees, of which there appear to be six or seven, according to Hrundas. The Respondent, in its answer, denies the appropriateness of that unit. At the hearing, and by their briefs, both the General Counsel and the Union contend that the appropriate unit, and the unit for which they seek the bargaining order, is one of housekeeping employees only, excluding, inter alia, the previously sought maintenance employees.

The General Counsel offers no explanation for this change of position. Indeed, he compounds the problem by misciting a case on the subject. He asserts (at p. 17 of his brief) that his "unit contentions are sustained by the Board's ruling in *Holiday Inn Troy*, 238 NLRB 1369. In that case, the Board found appropriate a unit which included a [sic] housekeeping department employees and excluded desk clerks, porters (bellman) and food and beverage employees, where, as in this unit, the housekeeping department was a separate department." Yet, he failed to note that the unit found appropriate in that case included the maintenance employees, the very group he now wishes to exclude.

Closer to the mark is the case cited by the Union, *Holiday Inn South*, 241 NLRB 235 (1979), enfd. 653 F.2d 238 (6th Cir. 1981). There, the Board, in summary judgment proceedings, found a housekeeping unit appropriate. The case may be distinguishable, however, as the disputed job classifications were not maintenance employees, but the front desk/porters and yardman. It is not clear that this hotel employed any maintenance personnel, or whether they were separately represented. The court, in enforcing the Board's order, relied on a case in which maintenance employees were included. I have found no other

[9] The General Counsel's letter of February 8, 1982, modifying the stipulation contains a typographical error, referring therein to December 31, 1981, rather than 1980.

[10] The card of Alicia Robledo has not been counted pursuant to a stipulation of the parties.

case which would exclude the maintenance employees from a housekeeping unit, and am not prepared to assume that *Holiday Inn South* is controlling, particularly since *Holiday Inn Southwest*, 202 NLRB 781 (1973), appears still to be good law. In that case the Board dismissed a petition seeking an election solely among housekeepers where 61 other employees, including maintenance workers, were employed.

Second, since *Holiday Inn Restaurant*, 160 NLRB 927 (1966), the Board has consistently applied the community of interest test to determine the appropriateness of units less than an all-employee unit in the hotel industry. The Respondent has made a showing here, unnecessary to detail fully, that the community of interest test would require the inclusion of at least some employees besides housekeepers. Certainly the six or seven maintenance employees should be included. If that were done, the Union would still have a majority; if any of the other hotel groups, front desk, and/or the bell staff, were included, it would not. And, third, the Union does not appear to wish to represent the maintenance employees; in its brief it supports the General Counsel's housekeepers-only unit. However, in view of my decision, infra, that a bargaining order is unwarranted it is not necessary to make a determination regarding either the appropriate unit, or the effect of the Union's desire to represent only the smaller group.

Assuming that an appropriate unit can be found and that the General Counsel has proven the Union represented a majority of the employees in it,[11] I am nonetheless unable to recommend as a remedy, in the unusual circumstances extant here, a bargaining order. There are some practical considerations. First, while the Respondent unlawfully discharged its employees on January 1, it did not do so because of an expressed opposition to unionization. Indeed no union activity and no union organizing was underway at the time. This is not to say that the Respondent did not oppose unionization; indeed, a week later its opposition was expressed. But the unfair labor practices it committed on January 1 and 3 bear no relation to that issue. The Union did not arrive on the scene until January 5 and did not meet with a significant number of employees until January 6 when it obtained the authorization cards. Were I or the Board to order the Respondent to recognize and bargain with the Union as a result of its January 1 and 3 unfair labor practices, the Union would be the beneficiary of a windfall.

As noted, Hrundas later did commit some unfair labor practices which must be characterized as antiunion: She interrogated employees regarding their union activities; she told employees not to speak to union officials under threat of penalty; and she promised to rectify complaints in order to dissuade employees from seeking further union assistance.

The question which must be asked is whether those three unfair labor practices are enough to warrant a bargaining order. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 at 602 (1969), the Supreme Court said that the Board recognizes that secret-ballot elections are "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." It went on to observe that there are circumstances, particularly where the employer disrupts the election process, where reliance on signed authorization cards may be the only way to assure the employees' choice.

The Court went on to point out that the Board has the authority to issue a bargaining order both in the "exceptional" case marked by "outrageous" and "pervasive" unfair labor practices as well as in less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine the union's majority and impede the election process. 395 U.S. at 613–614. It also noted a third category of still lesser offenses and said if the Board finds the employer's misconduct "minor or less extensive" and if its past effects can be erased and a fair election assured through traditional remedies a bargaining order could not be sustained.

In my view there is no evidence that Hrundas' three unfair labor practices, following a traditional remedial period, would impede the election process. To be sure, the General Counsel argues that the Union's majority status has been undermined in view of the fact that the employees followed Hrundas' directive and did not speak to union organizer Beck after her January 7 meeting. But that is surmise. Moreover, Beck was well aware that the original purpose of the employees' picketing was to obtain an audience with Hrundas so that she would cure the misdeeds first of Nelson and then of Cabanillas. When Hrundas agreed to see them, even though she probably did so because the Union had appeared on the scene, the employees had accomplished their original purpose.

Therefore, it cannot be said to the degree of certainty, usually seen in the more pervasive *Gissel* cases, that the Union's majority was undermined. The Union's majority may well have been only illusory; certainly it was acquired under tenuous circumstances.

But whatever the true desire of the employees may be, there is no showing that the effect of Hrundas' unfair labor practices of January 7 cannot be erased by traditional Board remedies involving a cease-and-desist order and a notice posting. Certainly the employees will be well aware that their reinstatement, whether as a result of Hrundas' conduct after January 7 or as a result of a Board order will be attributable to the Union's efforts. Furthermore, the cease-and-desist and reinstatement with backpay orders together with the appropriate notice will create an atmosphere, nearing the status quo ante, in which a fair election can be run, and their true desire regarding union representation can be fairly measured. This is, therefore, only a third category *Gissel* case. Supporting this conclusion are the following Board decisions: *Schrementi Bros.*, 179 NLRB 853 (1969); *Stoutco, Inc.*, 180 NLRB 178 (1969); *Bruce Duncan Co.*, 233 NLRB 1243 (1977), modified on other issues 590 F.2d 1304 (4th Cir. 1979); *Munro Enterprises*, 210 NLRB 403 (1974); *Dependable Lists*, 239 NLRB 1304 (1979); *Schulte's IGA Foodliner*, 241 NLRB 855 (1979), and *7-Eleven Food Store*, 257 NLRB 108 (1981).

[11] As the employees were unlawfully discharged, the approximately 30 replacements who were hired during the week of January 1 may not properly be considered as part of the unit. See *Air Express Corp.*, 245 NLRB 478 at 501 (1979), and cases cited therein.

The General Counsel further argues, however, that Respondent's unfair labor practices which occurred before the Union's January 5 arrival nonetheless cannot be fully remedied absent a bargaining order because they are aggravated and serious. I agree that the mass discharge is serious but can only observe that had the Union not appeared on the scene the Board's remedy regarding it would have been identical to that which I am ordering here, and that such a remedy has traditionally been deemed fully sufficient. The fact that the Union appeared later does not change the adequacy of that traditional remedy, nor does it demonstrate that a fair election cannot be held. These facts do not raise the case from the third *Gissel* category to the second.

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by discharging its entire housekeeping department in response to certain of those employees engaging in Section 7 concerted activity for their mutual aid and protection, as well as violating Section 8(a)(1) for making certain coercive statements, I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition I shall recommend that the Respondent be required immediately to offer reinstatement to those employees and to make them whole for any loss of pay they may have suffered by reason of the discrimination against them.[12] Backpay and interest thereon shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Ashkenazy Property Management Corporation d/b/a L'Ermitage Hotel, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act when it discharged all of its housekeeping department employees on January 1, 1981, because some of those employees acted in a concerted manner for the purpose of mutual aid and protection.[13]

3. The Respondent violated Section 8(a)(1) of the Act on January 3, 1981, through Cabanillas when he threatened employees with adverse consequences because they had engaged in or had caused the concerted activity of January 1,1981.

4. The Respondent violated Section 8(a)(1) of the Act when, on January 7, 1981, Hrundas interrogated employees regarding their union activities, prohibited them from talking to union officials, and impliedly promised to rectify adverse working conditions in order to deter those employees from pursuing union representation.

5. The Respondent did not engage in any other violation of the Act.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended

ORDER[14]

The Respondent, Ashkenazy Property Management Corporation d/b/a L' Ermitage Hotel, Beverly Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they seek to make collective demands to improve working conditions.

(b) Threatening employees with adverse consequences because they attempt to make collective demands for improved working conditions.

(c) Interrogating employees regarding their union activities, restricting them from communicating with union officials, and promising to rectify adverse working conditions in order to deter employees from seeking union assistance.

(d) In any like or related manner threatening, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer those housekeeping department employees discharged on January 1, 1981, reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary any replacements hired, and to make them whole for any loss of earnings or benefits they suffered as a result of the discrimination against them in the manner set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of

[12] It is unnecessary to determine whether the assistant housekeeper Eloisa Jacobo is an employee or a statutory supervisor. She is entitled to reinstatement with backpay in either circumstance. When the Respondent included her in the mass discharge of January 1, the Respondent could have had no purpose other than to signal employees that it would not tolerate employee protected concerted activity and would even go so far as to discharge low-level supervisory personnel in order to deter it. Thus, if she is a supervisor, her discharge tended to interfere with, restrain and/or coerce the employees in the exercise of their Sec. 7 rights. See *Better Monkey Grip Co.*, 115 NLRB 1170 (1956), enfd. 243 F.2d 836 (5th Cir. 1957); cf. *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir. 1954). If she is only an employee, her remedial rights are the same as those of the other employees.

[13] The complaint did not list the names of the employees allegedly unlawfully discharged. While the names of approximately 33 discharged employees can be ascertained from the signed authorization cards in evidence, and perhaps a few more are scattered in the record, more than 20 are as yet unidentified. Their names can be obtained in the compliance stage by scrutinizing Respondent's housekeeping department payroll records.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

this Order, as well as to determine the identity of all of those unlawfully discharged.

(c) Post at its Beverly Hills, California hotel copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the remainder of the complaint be, and hereby is, dismissed.

[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they choose to band together for the purpose of making a collective demand to improve working conditions.

WE WILL NOT threaten employees with adverse consequences because they attempt to make collective demands for improved working conditions.

WE WILL NOT interrogate employees with regard to their activities on behalf of Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL–CIO, or any other union and WE WILL NOT restrict them from communicating with union officials nor promise to improve working conditions to deter employees from seeking union assistance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately offer to reinstate all employees in our housekeeping department to their former jobs or, if they no longer exist, to substantially equivalent jobs and WE WILL make them whole for any loss of pay they may have suffered by reason of our discriminatory discharge of them on January 1, 1980, together with interest thereon.

ASHKENAZY PROPERTY MANAGEMENT
CORPORATION D/B/A L'ERMITAGE HOTEL